IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 786 of 2006

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANAIYALAL NATHALAL SHAH - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR MA KHARADI for Applicant(s) : 1,
MR MR MENGDE, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
DS AFF.NOT FILED (N) for Respondent(s) : 2,
MR NM KAPADIA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 26/09/2007

ORAL JUDGMENT

1. By way of this petition under Article 226 of the Constitution of India r.w. section 482 of the Cr.P.C., the petitioner – original accused has

prayed for an appropriate order quashing and setting aside the complaint being criminal case No.151 of 2005 pending in the Court of learned 7th Addl. JMFC, Surat.

2. A criminal case has been filed against the petitioner – original accused by the respondent No.2 herein in the Court of ld. JMFC, Surat being criminal case No.151 of 2005 for the offence punishable under section 138 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the NI Act” for short) alleging inter alia that a cheque dated 4.10.2005 for an amount of Rs.36,50,000/- was given by the petitioner to the respondent No.2 herein and the same was deposited with Union Bank of India and the same has been returned by the bank with an endorsement **“payment stopped by the drawer.”** It is also further alleged in the complaint that thereafter statutory notice was served upon the petitioner as required under the provisions of section 138 of the NI Act and thereafter, as within 15 days / within stipulated time, the

amount has not been paid towards the cheque in question, the aforesaid complaint has been filed. In the said complaint, the learned JMFC issued summons upon the petitioner for the offence under section 138 of the NI Act. Hence, the petitioner has preferred present petition under Article 226 of the Constitution of India r.w. section 482 of the Cr.P.C.

3. Shri M.A.Kharadi, learned advocate appearing for the petitioner has submitted that as such, there are no legal dues and in fact, by communication dated 1.10.2003 the petitioner has already communicated to the bank with regard to loss of cheque-book and therefore, it cannot be said that the petitioner has committed any offence as alleged under section 138 of the NI Act. He has also further submitted that as such, nothing is on record with regard to any statement / agreement as alleged dated 15.9.2003 and as there are no legal dues, the impugned complaint is required to be quashed and set aside.

4. Petition is opposed by the respondent No.2 herein – original complainant. Shri N.M.Kapadia, learned advocate appearing for the original complainant has submitted that present petition is required to be dismissed on the ground of suppression of material fact as pointed out in para – 13 of the affidavit in reply. It is submitted that the complaint was filed on 22.11.2005, however, the present petition came to be filed only on 9.4.2006 whereas the same was circulated for the first time on 6.12.2006 and in the meantime, plea of the petitioner was also recorded on 15.9.2006, however, the petitioner did not disclose before the criminal Court that he has already filed present petition. It is also further submitted that as such, on 14.11.2006 the petitioner sought time for compromise without raising any objections with regard to maintainability of the complaint and even a pursis was also given by the petitioner, which is not disclosed by the petitioner. Under the circumstances, it is requested to dismiss the present petition. It is

also further submitted that so far as the contention on behalf of the petitioner that there are no legal dues is concerned, considering section 139 of the NI Act, there is always presumption and it is his defence, which is required to be considered only at the time of trial on leading proper evidence. It is also further submitted that so far as the acknowledgement on the alleged communication by the petitioner to the bank alleged to have been received on 1.11.2003 is concerned, it is a question of evidence which is required to be proved on leading proper evidence as to whether in fact, the bank has received such a communication dated 1.11.2003 or not. Under the circumstances, it is requested to dismiss the present petition.

5. Shri M.R.Mengde, learned APP appearing on behalf of the respondent – State has requested to pass an appropriate order considering the averments and allegations in the complaint.

6. Heard the learned advocates appearing on behalf of the respective parties.

7. On bare reading of the complaint and the averments and allegations in the complaint, it prima facie discloses a case under section 138 of the NI Act. All ingredients of making out a case under section 138 of the NI Act are fulfilled. A cheque has been issued, which was deposited in the bank, which has been returned and for which statutory notice was given and within the stipulated time, the amount in question was not paid and the impugned complaint has been filed. Now, so far as the contention on behalf of the petitioner – original accused that there are no legal dues and/or the cheque was lost for which the intimation was given to the bank on 1.11.2003 are all defences of the petitioner, which are required to be considered at the time of trial on leading proper evidence. Even otherwise, there is a statutory presumption as contemplated under section 139 of the NI Act, however, it is true that it is rebuttable but

that rebuttal can be only at the time of trial on leading proper evidence. Under the circumstances when prima facie case is made out for the offence under section 138 of the NI Act, the impugned complaint under section 138 of the NI Act is not required to be quashed and set aside in exercise of powers under section 482 of the Cr.P.C. Under the circumstances, there is no substance in the present petition and the same deserves dismissal and is accordingly, dismissed. Rule is discharged. Ad-interim relief, granted earlier, stands vacated forthwith.

(M.R.Shah, J.)

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